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CHARLES ELMORE CROPLEY

No. 85

October Term, 1946

IN THE

Supreme Court of the United States

THE TRAILMOBILE COMPANY and INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW-CIO,

Petitioners,

v.

LAWRENCE WHIRLS,

Respondent.

REPLY BRIEF OF PETITIONER, THE TRAILMOBILE COMPANY

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An analysis of the Government's Brief on Behalf of Respondent discloses:

I. That some points are argued which are not at issue in this case;

II. That there are inconsistencies and factual misapprehensions;

III. That the legislative history not only does not support respondent's contention of fixed or permanent seniority, but to the contrary indicates Congressional intent to "restore" seniority rights held at the time of induction just as if the veteran had not gone in the service and no more; and,

IV. A failure to give effect to the contractual provisions between the petitioner-employer and the co-petitioner collective bargaining agent for and on behalf of respondent existing not only when respondent went into the service, but when he was re-employed and thereafter.

Replying to the brief, we will discuss these four points separately, in the above numerical order.

I

POINTS NOT IN ISSUE ARGUED IN GOVERNMENT'S BRIEF

The Government's brief for the respondent argues much that is not involved in this case.

1st. No question arises as to any change in respondent's seniority rights within one year of re-employment. What the rights of the veteran are within that period can and should await determination in a proper case involving such questions. That case will necessarily depend for its solution on the terms of the governing contract or system which established the veteran's seniority rights, as well as other rights, at the time of his induction into the service. It is contractual seniority rights to which the Act requires his restoration, and Congress by requiring such restoration gives him the protection of the terms thereof, and no other protection is necessary. The Act neither expressly nor by implication denies the right to bargain collectively periodically to meet circumstances and conditions as they arise.

2nd. No question of pay and status is here involved and the somewhat difficult questions that other cases may present manifestly cannot be solved on this record.

3rd. Neither is involved arbitrary action on the part of the employer nor the Union. Seniority here is based on contract, and here the employer has a collective bargaining contract which was held by the Ohio courts to be lawful and not arbitrary.

4th. Neither is the action of the respondent's lawfully accredited bargaining agent in making the contract of 1944 of which respondent complains one that was made to settle only the seniority of veterans. It established as of January 1, 1944, the seniority of every Highland employee who then entered the employment of Trailmobile, each one of whom before that date depended for his seniority on the agreement introduced for respondent on the hearing as Plaintiff's Exhibit C (R. 21). That agreement fixed seniority of Trailmobile employees also. It determined respondent's seniority with reference to the employees of both companies. The action of the bargaining agent was in settlement of a bitter dispute between the employees of the two companies, necessitated by the change in circumstances resulting from the discontinuance of Highland as an employer. The history of this dispute is found in the opinions of the National Labor Relations Board in 51 NLRB 1106 and 53 NLRB 1248, cited in respondent's brief, which refer to the decision of the Regional War Labor Board, The Trailer Company of America, 9 W.L.R. 809, which decision was reversed after the election had been ordered in 10 W.L.R. 374.

5th. Neither is there involved herein any question as to insurance or other benefits, the extent of which can only be determined in a case involving them by the "rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person (veteran) was ordered into such service" [U. S. C. A. 50, § 308(c)].

II

REPLIES TO RESPONDENT'S PRINCIPAL ARGUMENTS

Respondent's brief contains many inconsistencies and factual misapprehensions.

1st. In answer to our contention at pages 15 and 16 of our brief that the returned veteran's status and pay could be changed after one year's employment, the brief for respondent at page 35 states that in the view of the authors, "the Act does not differentiate, as to duration of the employer's obligation, between pay, status, and seniority," and on the next page points out that it is entirely possible to interpret Section 8 as placing seniority on a different plane from pay and status.

2nd. To make this difference, seniority rights, at page 36, are treated as "relatively stable, ordinarily do not fluctuate with industrial conditions as wages do, nor is there usually much need for change." The contrary appears from the history of this controversy as shown by (a) the decision of the NLRB and the WLB in 51 NLRB 1106 and 53 NLRB 1248 and that of the Regional War Labor Board, 9 W.L.R. 809; (b) the merger here of employees of separate companies; and also by (c) the experience of railroad employees as pointed out in the brief of Railway Labor Executives Association as amicus curiae.

3rd. The argument is made that because restoration requires continuity of service that therefore Congress must have intended the rights granted, especially those of seniority and insurance and other benefits, to continue perpetually notwithstanding the fact that the Act only protects the veteran in his employment for one year, as within that one year the veteran can neither be discharged, or, as this court indicates in the *Fishgold* case, demoted, without cause. There is no limitation on the right to discharge thereafter. If the argument be so far correct as that the word "restore" denotes continuity of employment, Congress limits its concern with such continuity to one year.

4th. As the right to discharge is inherent in the relation of employer and employee, except as limited by contract or by statute, it is impossible to graft onto the clause

restraining discharge without cause within one year, limitations on the right to discharge after the year as the brief for respondent repeatedly does.

5th. The argument for respondent is that the clause in Section 8 (b)(B), "unless the employer's circumstances have been so changed as to make it impossible and unreasonable to do so," is a clause applicable after restoration, and concludes therefore that a requirement for perpetual employment on the terms existing on the date of induction is reasonable because Congress has modified the requirement so as to warrant change in terms of employment whenever during the re-employment employer's circumstances have changed making it impossible or unreasonable to continue the employment on such terms. Congress has made no such qualification applicable during the continuance of the restored employment; the clause is limited solely to a qualification of the right to restore. It is apparent that counsel for respondent in order to support the argument for perpetual rights are driven to the necessity of writing a new law.

At pages 44 and 45 counsel read into the statute provisions for changes of terms after re-employment,

> "as new circumstances actually require, though not at the whim of the employer or a hostile union. . . . Necessary reductions in force caused by changed production requirements or altered economic conditions can be made. Technological advances warrant certain shifts in personnel requirements, and *similar substantive changes in industrial techniques and practices may make it unreasonable to continue a veteran in status quo.* In the case of seniority rights, it is unlikely that many changes will normally be required." (Italics supplied.)

We contend the circumstances in this case fall exactly within the words above which we have italicized. There

was certainly a change in industrial techniques and practices when petitioning company took over the assets and employees of the Highland Company which was dissolved. If their argument is sound, then certainly the merger of two plants along with the merger of the employees and their separate contractual rights, is a changed circumstance within the meaning of that clause. This respondent admits at page 62. (See infra, p. 10.)

The observation in the last sentence quoted that it is unlikely that many changes in seniority will normally be required can hardly be construed as a contention that when required they cannot be made. There certainly is nothing in the Act which makes seniority rights unchangeable when the changes are not applicable to veterans alone but to a whole body of fellow employees. As pointed out in Section IV of this brief, the changes in practices did make necessary a reconsideration of the question of seniority.

6th. Counsel at page 48 of the brief misinterpret our failure to argue in respect to a situation not before the court as evidence that collective bargaining cannot interfere with the veteran's rights during the first year of reemployment and that that admission somehow strengthens their contention that collective bargaining can never change the seniority rights of the returned veteran. Manifestly because of Section 16 (a) of the Selective Service Act [50 U.S.C.App. § 316(a)] the National Labor Relations Act is suspended to the extent, and only to the extent, that there be conflict between the two. The provisions of the National Labor Relations Act must prevail with respect to the veteran restored to his preservice position, as with respect to all his fellow employees, unless the Selective Service Act clearly otherwise provides. The presumption is that the two acts are harmonious. To make a conflict respondent's counsel are driven to the necessity of arguing that Con-

gress intended the seniority rights to be perpetual. The natural inference would be that, unless expressly otherwise provided in the Act, the seniority right to which he is restored, being itself the result of collective bargaining pursuant to the National Labor Relations Act, would continue to be subject to such bargaining—at least after the one year's re-employment during which he could only be discharged for cause.

7th. At page 50 of the brief it is argued that respondent's joining the union was compelled and because of that compulsion he cannot be held to have assented to the union agreement. Under the terms of the National Labor Relations Act, the agreement of the Union as the duly certificated bargaining agent bound the company and all its employees whether members of the union or not. *Elder* v. *N. Y. C. R. Co.*, 152 F. (2d) 361 at 364 (6th Circuit).

8th. On pages 59 and 60 of respondent's brief, it is argued that the recent re-enactment and amendment of the Act continuing Section 8 indefinitely is particularly significant as an indication that Congress intended to perpetually freeze the seniority status as of the date of entrance into service. We submit that no such intention may reasonably be inferred from the amendment. Attention is invited to the fact that the recent re-enactment and amendment of the Act (Act of June 29, 1946, Public Law 426, 79th Congress, second session, c. 522) not only continues Section 8 indefinitely, but also continues Sections 3 (b), 3 (c), 3 (d), and 16 (b) for indefinite periods. Section 3 (b) provides in substance that each man inducted on and after October 1, 1946, shall serve a period of service and training of eighteen consecutive months, and that any man inducted prior to October 1, 1946, who shall have completed a period of training and service of eighteen months or more shall, *upon his request*, after such date, be relieved of his period of training and service under the Act.

It further provides that notwithstanding any of the provisions of the section, whenever, after January 1, 1946, the Congress declares that the national interest is imperiled, such period of training and service may be extended by the President to such time as may be necessary in the interest of national defense. Therefore, since Section 3 (b) was made permanent, it is quite clear that men inducted both before and after October 1, 1946, may be returning to civilian life over an indefinite period of time in the future, since they may not desire to be released immediately upon the completion of eighteen months' service. As a matter of fact, men in the service for eighteen months or over who are eligible for discharge may and probably will be encouraged to remain in the service for additional periods of time because of their particular training or geographical location, at the time of completion of eighteen months' service. Such was the case after the cessation of hostilities in World War II when men with sufficient points to warrant discharge were requested, in many instances, to remain in service for additional periods of time in order that an undue hardship on the Army's program might not be occasioned by their request for discharge. In view of the fact that the indefinite extension of Section 3 (b) meant that inductees would be returned to civilian life over an indefinite period of time in the future, it was only logical that Congress should also extend Section 8 indefinitely, in order that these men might be assured its protection as they returned to civilian life.

We submit that this is quite clearly indicated by Chairman May in the sentence following the one quoted in respondent's brief on pages 59 and 60. Chairman May went on to say [92 Cong. Rec. 3659 (daily ed.)]:

> "I might add, however, that we have pending before the Committee now a separate bill, the purpose of which is to make that a permanent statute so that men

will have priority on their jobs *as they go back after they are in the service.*" (Italics supplied.)

In view of the long period of time in the future during which inductees may request and receive their discharges; in view of the indefinite extension of Section 3 (b); and in view of the language of Chairman May above quoted, we submit that by its indefinite extension of Section 8, Congress intended merely to extend the protection of said section to inductees "as they go back after they are in the service," and there can be no inference that Congress intended to permanently fix the seniority status in existence at the time the inductee entered the service.

9th. Respondent's brief takes issue with some language in our original brief to the effect that Section 8 did not enlarge the rights of the returned veteran over those which he would have had had he not gone into the service. We were speaking only of his seniority rights. We appreciate that this court has said in the *Fishgold* case, "he was, moreover, to gain by his service for his country an advantage which the law withheld from those who stayed behind," but those advantages are enumerated in the succeeding paragraph of the opinion as four in number. Respondent had the benefit of each of those four advantages. The court certainly did not enumerate as an advantage over the stay-at-home employee that the returned veteran's seniority rights would remain fixed in perpetuity notwithstanding the subsequent change in seniority of his stay-at-home fellow employees legally established by the duly certified bargaining agent.

10th. Throughout the forepart of respondent's brief, it is argued flatly that seniority is and should be fixed and permanent as of the date of induction. At page 19:

"The crucial right here is that a restoration to a position with at least the same seniority as the pre-service job. That right, and the correlative obligation of the

employer to restore the veteran to such a position, are continuing ones, which the statute, properly and fairly construed, extends beyond the first year of re-employment."

At page 21 they argue that the veteran steps back on the seniority escalator at the point he would have occupied had he kept his position steadily during the war, "even though interim changes might have altered the accrual rate of his seniority rights." And again at page 22:

> "The veteran was to have the fixed and accustomed starting point of his old job from which to begin his economic readjustment to civilian life."

At page 29:

> "And since the statute imposes no time limit on existence of the right, it must have been intended to last as long as the veteran remains in the company's employ."

Thereafter, respondent is confronted with the dilemma of protecting that fixed and permanent right to the Trailmobile veterans as distinguished from respondent and his fellow-Highland workers, and they have to concede at page 62 that

> "As for the Trailmobile veterans with inferior seniority, it is true that Whirls' reinstatement makes it impossible for them to receive exactly the same seniority status as they previously had, but, in all probability, Whirls' position on the consolidated seniority roster is likewise somewhat changed because of the merger. It is that which has made it impossible to restore each veteran to his exact place on the seniority lists, but there is no reason to believe that the minor adjustments in the standings necessitated by the consolidation are substantial enough to derogate from either Whirls' or the Trailmobile veterans' rights."

Then they admit that Section 8 (b)(B) "entitles them only to a position of like seniority—*not a position of precisely the same seniority but of substantially the same.*" (Italics supplied.)

Thus, conceding that the statute does not require a "position of precisely the same seniority," what is to be the measuring stick for "like" seniority? Having read into the statute an iron-bound rule, they are forced, by the circumstances of this case, to modify it. The only way such question can be determined is through collective bargaining as was done in this case.

11th. By constant repetition of the argument under (b) (B) of the Act the Government attempts to construe seniority as permanent and inviolable. However, the statute provides in (b) (B), ". . . such employer shall restore such person to such position or to a position of like seniority, status, and pay. . . ." Therefore the permanence construed to seniority must likewise be construed to "status" and "pay." This would mean that regardless of fluctuating wage rates or collective bargaining agreements, the employer would have to pay the veteran forever the same wages he received when he entered the Army. The impossibility of such a construction is apparent on its face. Furthermore, that provision of the Act continues, ". . . unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;". To avoid this impossible construction, this latter quoted provision has been invoked by the Government as of continuing applicability after re-employment. But, it is equally applicable to the three terms, "seniority," "status," and "pay." Certainly, the primary purpose of the clause is to limit the necessity of restoration to a position, and it is not possible to confine such limitations to the matter of "status" and "pay."

III

THE LEGISLATIVE HISTORY OF THE ACT DOES NOT INDICATE THAT CONGRESS INTENDED TO PERMANENTLY FIX SENIORITY RIGHTS

Notwithstanding the argumentative presention of legislative history on pages 51 through 59 of the brief, the words quoted from the Congressional Record appear to uphold petitioner's contentions more effectively than they do respondent's contentions. The general import of the words therein quoted is that the veterans shall be "restored" and such restoration shall be to a place where he left off. There are no words explicitly saying nor even indicating that restoration means other than putting him back where he would have been had he not gone into the service, nor can respondent point to any words which say or indicate that the returned veteran acquires greater rights to seniority than he would have had if he had not gone into the service.

In tracing the history of Section 8, respondent's brief itself discloses that the first committee drafts stated the Congressional purpose to be that every returnee should be re-employed without "loss of seniority." Therefore, from the very beginning, Congress was thinking in terms of guaranteeing only a retention of whatever seniority rights were in existence when the men went into the service and there is no intent manifest to broaden the seniority rights which were being enjoyed at the time service was entered. Clearly the rights which Whirls had to seniority could be changed by subsequent contracts as was done, with the approval of the Ohio courts, for all Highland employees.

On page 54 of respondent's brief, there appears a quotation from the explanation of the seniority provisions as made by the Chairman of the House Military Affairs Committee, during the House discussion on the National Guard

Act. In such quotation the purpose is stated to "restore" the returnee to his same seniority status. In other words, the returnee was to be given back what he had at the time he left his employment to enter service and nothing is said about any intention to permanently fix his seniority privileges upon his re-employment. Therefore, it would not appear that the Congress had any intention of augmenting seniority benefits at the time it passed the National Guard Act. Subsequently the re-employment provisions of the National Guard Act were carried forward into the Selective Training and Service Bill with a further amendment elaborating paragraph (c) to its present form. Such amendment to paragraph (c) in effect significantly provides that the returnee shall be considered during the period of service as though he were on furlough or leave of absence from his employment. Obviously if the respondent, Whirls, is considered as having been merely on furlough or leave of absence from the Company, then upon his re-employment his seniority rights would in no wise be enlarged.

On page 56 of respondent's brief, there appears a quotation from Chairman May explaining the purpose of the amended section (c) as inserted in the Selective Service Bill. This explanation was made in reply to a question from the floor of the House as to whether the section would compel employers to pay Social Security and other taxes while the employee was in the armed forces, and Chairman May replied that the chief purpose of the amendment is to "preserve" the seniority rights of employees. Here again the congressional intent is shown to "preserve" rather than to augment and forever fix the seniority rights of those men who entered the armed forces.

The same intention evidenced by the quotation in explanation of and debate on the National Guard Bill, and the Selective Service Bill in the House is evident also

from a reading of the discussion of the bills before the Senate. In explaining the conference report on the National Guard Bill, Senator Shepherd stated (86 Cong. Rec. 10791):

> "In the same connection the House had an amendment, inserting the word 'seniority', before the words 'status and pay' wherever such words occurred in such paragraphs. This was to make certain that seniority employment rights are *maintained*. The Senate agreed." (Italics supplied.).

At the bottom of page 56 and the top of page 57, respondent quotes from Senator Shepherd (86 Cong. Rec. 10095) but failed to quote a further statement by Senator Shepherd as follows:

> "Section 8 attempts to offer a trainee or Reserve officer on active duty as much protection with respect to re-employment and retention of employment benefits *as is within reasonable bounds*." (Italics supplied.)

Again, in explaining the amended paragraph as proposed in the Selective Service Bill, Chairman May stated (86 Cong. Rec. 10914):

> "That amendment would make certain that all trainees would receive the same insurance and other benefits as though he were on furlough or leave of absence in private life. It seems to me to be a good suggestion."

In fact all of the citations cited by the respondent and all of the discussion which we have been able to find in the Congressional Record clearly demonstrates the intention of Congress to preserve and maintain the status quo of seniority rights so that the employees would return to their jobs with the same rights of seniority as when they entered the service, and nowhere is there any statement made nor intention shown of increasing or of permanently fixing the seniority benefits so that they may become immutable after the entry into service.

IV

RESPONDENT'S BRIEF FAILS TO GIVE EFFECT TO RESPONDENT'S CONTRACTUAL RELATIONS WITH REFERENCE TO SENIORITY

The respondent after his discharge was given back his old position with all the seniority rights annexed to that position. These seniority rights are found in Plaintiff's Exhibit C (R. 21-23) which was the identical contract under which he worked when he was inducted and under which he came back to work after discharge. That contract was so drawn as to protect the employees of the Highland plant and also of the Trailmobile plant from loss of seniority due to invasion into their plant by employees of the other. Art. 13 of that contract (R. 21), permitting transfers from one plant to another in preference to hiring new men, provides:

> "Employees so transferred from one plant to another, when called back to the plant *at which they hold seniority* may return. . . ." (Italics supplied.)

By Art. 14, Section 1, the departments of each plant were separate from the departments of the other. Section 2 (R. 22) provides, "Seniority shall be departmental."

Section 5 provides, "But any or all employees transferred temporarily shall become the junior to all employees in the department to which transfer is made."

Section 6 provides, "Any employee may transfer permanently to another department, but will become junior to all employees on the seniority list in the department to which transfer is made."

There was no provision in the contract of 1942 on which Highland employees could rely to give them seniority over Trailmobile employees. The agreement fixed the seniority of the employees of each plant.

If the agreement is broad enough to cover the transfers made by the Company from Highland to Trailmobile, manifestly the agreement made the respondent junior to all Trailmobile employees in that department to which he was transferred. *If the agreement did not provide for such transfers made by the Company, there was no agreement giving him seniority in the Trailmobile plant.* The AFL Union ruled that Highland employees were entitled to seniority in each comparable Department of the Trailmobile Company ahead of all the Trailmobile employees in that department.

The Trailmobile employees deemed this to be in violation of the rights secured to them by this same agreement on which respondent relies. They broke away from the AFL Union, were given the right to a new election to determine their bargaining agent, and as a result of that election, the CIO Union, one of the petitioners herein, was chosen and certified as the bargaining agent for the employees of both companies and bargaining followed between that bargaining agent and the company, resulting in the 1944 agreement, more than fourteen months after respondent's re-employment. The Hess suit followed as a class suit to determine the validity of that agreement so far as it affected the seniority of all the Highland employees. It was a class suit for the benefit of all such employees all of whom, including the respondent, were named in an exhibit to the petition (R. 37). It may be that since the plaintiff, Hess, was not a returned veteran, the judgment in the class suit did not determine the question argued here as to whether or not the rights of a returned veteran were so permanent that they could not be changed by the bargaining agent. Be that as it may, it did determine what were the seniority rights of the positions held by Highland employees, one of which the respondent held at the time of his induction into the armed forces and to which he had

been restored on his return. It is to the seniority of that position that this court has decided in the *Fishgold* case the respondent was entitled. His seniority rights in that position to which he had been restored were no different than the seniority rights of all other Highland employees. The Hess suit definitely determined that the seniority rights of the positions held by Highland employees at the time of the merger were such as permitted and made lawful the contract of 1944, made as a result of bargaining between the Company and the certified bargaining agent.

CONCLUSION

We, therefore, respectfully submit that the Government's brief has erroneously construed the Act by reading into the Act words and meanings which are not therein contained, and that the Circuit Court of Appeals below erred and that it should be reversed.

Respectfully submitted,

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